UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STEVEN D. NIDAY, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER AT07528910256 DATE: JAN 9 1990

James W. Ray, Slocomb, Alabama, for the appellant.

Richard W. Vitaris, Fort McPherson, Georgia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the March 14, 1989 initial decision which dismissed his appeal as settled. For the reasons discussed in this Opinion and Order, the Board DENIES the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order,

still DISMISSING the appellant's petition for appeal as settled.

BACKGROUND

The appellant appealed to the Atlanta Regional Office[1] of the Board from the agency's action removing him from his position of Heavy Mobile Equipment Repairer for failure to maintain membership in an active Army Reserve unit. Prior to a decision on the merits of the case, the parties entered into a settlement agreement. The administrative judge accepted the agreement into the record and, in an initial decision dated March 14, 1989, dismissed the appeal as settled.

On April 17, 1989, the appellant filed a submission with the Board, challenging the agency's interpretation of the agreement, asserting agency delay in complying with the terms of the agreement, and requesting that the Board: (1) Remand the case to the administrative judge and hold the initial decision in abeyance until the parties could resolve the settlement issues; (2) grant the appellant an extension of time to file a petition for review or extend the date on which the initial decision becomes final; (3) accept the appellant's submission as a petition for review; or (4) grant any other relief to which it finds the appellant might be entitled. We accept the appellant's submission as a petition for review.

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[1] Because of workload considerations, the appellant's appeal was subsequently transferred to the Chicago Regional Office for adjudication. *See* Initial Appeal File at Tab 9.

The agency has responded to the petition for review, challenging the appellant's interpretation of the settlement agreement. The appellant has filed a brief in opposition to the agency's response, and the agency has filed a motion to strike the appellant's brief.

ANALYSIS

1. The appellant has not shown mutual mistake by the parties or fraud by the agency.

The Board favors settlement agreements provided they are consistent with law, equity, and public policy. *See Department of Health and Human Services v. Haley*, 20 M.S.P.R. 365, 367 (1984). *See also Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981) (public policy favors settlement agreements in Board actions, as in civil actions, which serve to avoid unnecessary litigation and to encourage fair and speedy resolution of issues), *modified sub nom. Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989). This Board has held, however, that, before dismissing an appeal as settled, an administrative judge must document for the record whether the parties reached an agreement, whether they understood its terms, and whether the settlement was enforceable by the Board. *See Mahoney v. United States Postal Service*, 37 M.S.P.R. 146, 149 (1988).

While the administrative judge specifically noted that the parties had reached a settlement agreement and that the agreement was enforceable by the Board, see Initial Decision at 2-4, he did not specifically document that the parties

understood the terms of the settlement agreement. We note, however, that both parties were represented, and it appears that the settlement was reached at least two weeks after negotiations began. *See* IAF at Tabs 11, 13. Further, the appellant does not contend that he does not understand the terms of the settlement agreement, only that he disagrees with the agency's interpretation of one of its provisions. In signing the agreement, he acknowledged a provision in the agreement that specifically states that he accepted and agreed to the terms of the agreement. *See* IAF at Tab 13. Therefore, we find that the parties understood the terms of the settlement agreement.

The settlement agreement provides in pertinent part as follows:

> In consideration of this agreement, the Army agrees to pay the appellant a sum of back pay equal to $12,000. This is a gross payment of back pay and is subject to all appropriate deductions required by law such as taxes, medicare, and retirement. In addition, the Agency agrees to credit the appellant's leave account with the actual amount of annual and sick leave which the appellant would have accrued from the date of appellant's removal to the date of appellant's reinstatement had he not been removed/involuntarily suspended. The Agency agrees to credit the appellant's leave account with an amount of military leave not to exceed thirty days.

See Initial Appeal File (IAF) at Tab 13.

The appellant contends that the amounts to be offset from his $12,000.00 in back pay do not include $17,000.00 in refund of his retirement contributions he received after his removal. He contends that the agency has erroneously requested that he reinvest the $17,000.00 in his retirement plan, and repay

other sums. He asserts that, were he to make such repayments, he would incur liability in the amount of $9,000.00. He contends that this was not his understanding of the agreement and that the reference in the settlement agreement to withholding for retirement applied only to the retirement deductions incidental to the $12,000.00 back pay. *See* Petition for Review at 3-4, Petition for Review (PFR) File at Tab 1. The appellant further contends that the agency's representative knew prior to the settlement that he [the appellant] "believed or would believe" that the amounts to be deducted from the back pay were restricted to only those deductions incidental to the back pay award. Appellant's Brief at 5. He further contends that the agreement constitutes a waiver of the retirement refund debt, that the agency is bound by the agreement entered into by its representative, and that the agency should now instruct the Office of Personnel Management (OPM) to accept the agreement as a request for waiver of the debt, or waive the reimbursement and allow the appellant to reimburse the retirement fund, should he become financially able to do so in the future. *Id.* at 4.

A party challenging a settlement agreement bears the burden of proving that the agreement is invalid. *See Hazlett v. Department of Justice*, 25 M.S.P.R. 623, 625 (1984), *citing to Asberry v. United States*, 692 F.2d 1378 (Fed. Cir. 1982) (a party attacking a settlement agreement must prove that it was procured by fraud practiced upon that party or by mutual

mistake under which both parties acted). The appellant contends that, in light of the agency's denial that a mutual mistake occurred, he is compelled to "raise the issue of fraud."[2] *See* Appellant's Brief at 4, PFR File at Tab 4. Under 5 C.F.R. § 550.805(e)(2), an agency, in computing back pay, is required to deduct any erroneous payments, including payments from a Federal employee retirement system, that an employee received from the government. *See Dailey v. Department of Health and Human Services*, 33 M.S.P.R. 493, 495 (1987). In *Morris v. United States Postal Service*, 32 M.S.P.R. 358, 360 (1987), the Board held that computation of back pay is governed by Postal Service regulations and is not a matter for negotiation between the employee and the agency.

Also, in the instant case, we note that OPM's guidelines provide for certain specified procedures to be followed in computing back pay. The applicable guideline provides in pertinent part as follows:

> [A] refund of retirement contributions paid to an employee based on a separation which is subsequently found erroneous and cancelled by restoring the employee to duty retroactively *so that there was no break in service* removes the legal basis for the refund. *A refund which was paid in error represents a debt due the retirement fund which must be deducted from any backpay entitlement.* If the restored employee is entitled to backpay, the agency should contact the Office of Personnel Management to

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[2] Because the appellant's allegation of fraud is based on the agency's response, we accept this allegation as new and material evidence and deny the agency's motion to strike the appellant's response. *See* 5 C.F.R. § 1201.114(i) (once the record is closed, the Board will not accept additional evidence or argument absent a showing that it is based on new and material evidence that was previously unavailable).

> determine the amount of refund, if any, to be offset against the backpay entitlement.

See FPM Supp. 990-2, subch. S8-7d.(2) (Aug. 18, 1988) (emphasis added). Thus, we find here that back pay is governed by OPM's regulations and that the computation of back pay is not a matter for negotiation between the employee and the agency. We further find no evidence of mutual mistake or fraud and, thus, no basis upon which to set aside the settlement agreement.

In any event, we note that the agency alleges that the appellant's representative indicated during settlement negotiations and other discussions "that the appellant desired his records to reflect no break in service" and that, in order to accomplish this purpose, it was required to deduct the retirement refund from the appellant's back pay. *See* Agency's Response to Petition for Review at 3, PFR File at Tab 2. This assertion is supported by the appellant's petition for appeal, in which the appellant specifically stated in a December 7, 1988 cover letter forwarded with his petition for appeal, "I request that I be reinstated in my position as a heavy mobile equipment repairer, at Fort Rucker, Alabama with back pay and without break in service for pension purposes." *See* IAF at Tab 1. Also, in response to question 22 on the Board's appeal form as to what action the appellant would like the Board to take in his case, the appellant stated, "Rescind personnel action of April 6, 1987 and order that I be reinstated with back pay and without break in service for pension purposes." *Id.* Thus, we find that the appellant desired to be reinstated

to his former position without his records reflecting a break in service. In order to accomplish this purpose, the agency was required to withhold from the appellant's back pay the amount of the refund of his retirement contributions.

2. The appellant should direct any request for a waiver of repayment of the refunded retirement contributions to OPM.

The appellant further contends that the agency is authorized under its own regulations, AR 37-104-3, as well as FPM Supp. 990-2, to waive his indebtedness to the Civil Service Retirement and Disability Fund. The appellant has not submitted a copy of the agency regulation in question for review. Further, although the FPM provides for waiver of "recovery of erroneous payments of any amount from the Civil Service Retirement and Disability Fund," such a waiver may be granted by OPM, not by the employing agency, and requests for a waiver should be submitted to OPM. See FPM Supp. 990-2, subch. S8-7d.(5). Thus, if the appellant believes that he is entitled to a waiver, he should file a request therefor with OPM.

3. The appellant may file a petition for enforcement with the regional office if he believes that the agency is in noncompliance with the terms of the settlement agreement.

As to the appellant's contention that the agency has failed to comply with the terms of the settlement agreement by delaying in restoring his leave, we find that that contention

was premature when made. See Petition for Review at 4-5, PFR File at Tab 1. Under 5 C.F.R. § 1201.182(a), a party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction by filing a petition for enforcement with the regional office which issued the initial decision. In the instant case, the initial decision did not become a final decision of the Board inasmuch as the appellant filed his petition for review on April 17, 1989, one day prior to the initial decision's becoming final. The appellant, however, is not precluded from subsequently filing a petition for enforcement with the regional office, subject to our findings in this Opinion and Order, if he believes that the agency continues to fail to comply with any of the terms of the settlement agreement.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.